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No. 09-1082

FEB 12 2010

In The
Supreme Court of the United States

PHILLIP R. NEELY,

Petitioner,

v.

CITY OF RIVERDALE, IRIS JESSIE, THETUS A. KNOX, T. MICHAEL MARTIN and WANDA WALLACE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the tolling of the time to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(4)(A)(iv) applies when multiple motions for reconsideration are filed?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit dismissing sua sponte, for lack of jurisdiction, petitioner's notice of appeal is unreported. (Petitioner's Appendix ("Pet. App.") B). The decision of the United States Court of Appeals for the Eleventh Circuit denying petitioner's motion for reconsideration is unreported. (Pet. App. A).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered judgment on September 22, 2009. (Pet. App. A). The Eleventh Circuit then entered an order denying petitioner's motion for reconsideration on November 17, 2009. (Pet. App. A). Petitioner initially attempted to file his petition for writ of certiorari on or about November 27, 2009. The Clerk of this Court rejected the petition by letter dated January 5, 2010. Petitioner filed a petition for writ of certiorari (amended) on or about March 5, 2010. Accordingly, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. Federal Rules of Appellate Procedure 4(a)(1)(A)

   In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

2. Federal Rules of Appellate Procedure 4(a)(4)(A)(iv)

   If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

   (iv) to alter or amend the judgment under Rule 59.

3. Federal Rules of Civil Procedure Rule 59(e)

   (e) A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

STATEMENT OF THE CASE

This case is yet another desperate attempt by petitioner's counsel to avoid payment of sanctions imposed against him for his continued abusive, frivolous and vexatious litigation tactics. The underlying

litigation commenced on July 25, 2005 when petitioner, a City of Riverdale police officer, alleged discrimination based on race and gender and retaliation for having filed charges with the Equal Employment Opportunity Commission ("EEOC"), in violation of 42 U.S.C. § 1983, 42 U.S.C. § 1988, 42 U.S.C. § 1991, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). On March 29, 2007 the district court granted summary judgment to respondents. In addition, the district court imposed sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. Petitioner appealed and the United States Court of Appeals for the Eleventh Circuit upheld the grant of summary judgment on the merits but did not address the sanctions issue since a final order on the amount of sanctions had not been entered by the district court. Petitioner filed a Petition for Certiorari with this court on the underlying Title VII claim which was denied on October 6, 2008.

After two years of appeals and delays, on March 23, 2009, the district court imposed sanctions solely against petitioner's counsel in the amount of $30,955.00. Petitioner filed a motion for reconsideration on April 2, 2009 and an amended motion for reconsideration on April 3, 2009; both were denied on May 22, 2009. On June 5, 2009, petitioner filed a second motion for reconsideration and a motion to vacate the district court's May 22, 2009 denial of the reconsideration. On July 15, 2009 the district court denied petitioner's second motion for reconsideration and motion to

vacate. Petitioner filed a notice of appeal on August 12, 2009 appealing seven (7) separate orders of the district court including the determination of the amount of sanctions.

The United States Court of Appeals for the Eleventh Circuit dismissed petitioner's notice sua sponte on September 22, 2009. (Pet. App. B). The Eleventh Circuit denied petitioner's motion for reconsideration on November 17, 2009. (Pet. App. A).

ARGUMENT

Rule 4(a) of the Federal Rules of Appellate Procedure ("FRAP") provides that a notice of appeal must be filed within thirty (30) days after the judgment or order appealed from is entered. However, the timing for filing a notice of appeal is tolled when a motion to alter or amend the judgment has been timely filed under Rule 59 of the Federal Rules of Civil Procedure. FRAP 4(a)(4)(A)(iv). Nevertheless, the tolling effect of FRAP 4(a)(4)(A)(iv) does not continue in perpetuity.

Petitioner contends that his notice of appeal was timely filed despite the fact he did not file a notice of appeal following the denial of his initial motion for reconsideration entered on May 22, 2009. Petitioner's notice of appeal should have been filed within thirty (30) days of that decision, or by June 21, 2009. Petitioner's notice of appeal was not filed until August 12,

2009. Thus, the Eleventh Circuit properly dismissed petitioner's appeal.

I. Timing for Filing a Notice of Appeal is not Tolled on Successive Motions for Reconsideration

The Eleventh Circuit has correctly ruled on the issue of successive motions for reconsideration and the tolling of the time to file a notice of appeal. *Marsh v. Department of Children and Families*, 259 Fed.Appx. 201, 2007 WL 4403536 (11th Cir. 2007), citing *Wright v. Preferred Research, Inc.*, 891 F.2d 886, 889 (11th Cir. 1990); *Stevens v. Wachovia Bank*, 2010 WL 774322 (11th Cir. 2010). In *Marsh*, the court held plaintiff's second motion for reconsideration did not toll the 30-day time limit for filing a notice of appeal. *Marsh*, 259 Fed.Appx. at 204-205. Moreover, the 30-day period began to run when the district court entered its order denying the party's first amended motion for reconsideration. *Id.* The Eleventh Circuit held "the time for appeal is postponed only by an *original* motion of the type specified. *I.e.* a motion to reconsider an order disposing of such a motion will not further postpone the time to appeal." *Id.*, citing *Wright,* 891 F.2d at 889.

Here, petitioner's amended motion for reconsideration filed April 3, 2009 was denied by the district court on May 22, 2009. As such, petitioner's notice of appeal must have been filed by June 21, 2009 to be considered timely. It was not. Despite the fact that

petitioner filed multiple motions for reconsideration, it is clear that his deadline for filing his notice of appeal was not tolled after the initial denial. As such, the Eleventh Circuit properly dismissed petitioner's appeal.

The Eleventh Circuit is not alone in its interpretation of FRAP 4(a)(4)(A)(iv) in conjunction with FRCP Rule 59. The First, Second, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh and DC circuits all agree with the interpretation of the appellate rules utilized by the court in this case. *See Colon-Santiago v. Rosario*, 438 F.3d 101 (1st Cir. 2006); *U.S. v. Helmsley*, 864 F.2d 266, 268 (2nd Cir. 1988); *In re Stangel*, 68 F.3d 857, 859 (5th Cir. 1995); *Peabody Coal v. Abner*, 118 F.3d 1106 (6th Cir. 1997); *Needham v. White Labs., Inc.*, 639 F.2d 394, 397 (7th Cir.), *cert. denied*, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 237 (1981); *Stark v. Lambert*, 750 F.2d 45, 47 (8th Cir. 1984); *U.S. v. Glover*, 46 F.3d 1152 (10th Cir. 1995); *American Sec. Bank, N.A. v. John Y. Harrison Realty, Inc.*, 670 F.2d 317, 320 (D.C. Cir. 1982); *Acevedo-Villalobos v. Hernandez*, 22 F.3d 384, 390 (1st Cir.), *cert. denied*, 513 U.S. 1015, 115 S.Ct. 574, 130 L.Ed.2d 490 (1994).

To hold that petitioner's multiple motions for reconsideration could perpetually toll the time for filing a notice of appeal would lead to the absurd result: a losing party could continue litigation indefinitely by repeatedly filing virtually identical motions for reconsideration without consequence. In that circumstance, a successful litigant, such as respondent,

would never realize its success nor be free from frivolous litigation. Indeed, respondents have defended this claim for five years and at every appellate level, yet still do not have relief from petitioner's harassing and abusive litigation tactics that warranted sanctions against petitioner's counsel in the first place.

CONCLUSION

Despite petitioner's contentions to the contrary, the Eleventh Circuit properly dismissed petitioner's notice of appeal. Petitioner failed to file the notice of appeal pursuant to the 30 day requirement of FRAP 4(a). As such, based on the foregoing, respondents respectfully pray that this Court denies petitioner's petition for a writ of certiorari.

Respectfully submitted,

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